Office - Supreme Court, U. S.
FILED
AUG 4 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 347

TASTY BAKING COMPANY,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

HUGH SATTERLEE,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition	1
Question presented	1
Statutes and regulations involved	2
Statement	2
Error assigned	3
Reasons for granting the writ	3
Brief in support of petition for writ of certiorari	6
Opinion below	6
Jurisdiction	6
Statement	6
Argument	6
Conclusion	12
Appendix	13

Table of Cases.

Armour & Co. v. *Harrison*, 19 A. F. T. R. 1347	4
Armour & Co. of Delaware v. *Harrison*, 95 F. (2d) 993 (C. C. A. 7th, 193.)	4
Atlantic Coast Line Railroad Company v. *Powe*, 283 U. S. 402, 404 (1931)	7
Cincinnati Soap Co. v. *United States*, 22 Fed. Supp. 141	4
Colgate-Palmolive-Peet Co. v. *United States*, 37 Fed. Supp. 794	4
Hamilton-Brown Shoe Company v. *Wolf Brothers Company*, 240 U. S. 251 (1916)	7
Loose-Wiles Biscuit Co. v. *Rasquin*, 95 F. (2d) 438 (C. C. A. 2d, 1938), 305 U. S. 611	4
United States v. *Carver*, 260 U. S. 482, 490 (1923)	6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 347

TASTY BAKING COMPANY, *Petitioner,*

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

Petition.

Petitioner respectfully prays that a writ of certiorari issue to review a judgment of the Court of Claims which dismissed after trial a petition in an action brought by the petitioner to recover taxes upon the processing of coconut oil and coconut oil mixtures which were exacted of the petitioner by the respondent in reliance on Section 602½ of the Revenue Act of 1934 (48 Stat. 680-763; 26 U. S. Code, Sec. 999) (R. 14).

Question Presented.

The question presented is:

Whether the excise tax imposed by Section 602½ (a) of the Revenue Act of 1934 on the first domestic processing of

coconut oil and coconut oil mixtures includes within its scope a second domestic processing by the petitioner after May 10, 1934, the effective date of the Act, of oil and mixures which had received a previous and first domestic processing by petitioner's vendors prior to May 10, 1934.

Statutes and Regulations Involved.

The pertinent portions of the applicable statutes and regulations are set forth in the Appendix (*infra*, pages 13 to 16).

Statement.

Section 602½ (a) of the Revenue Act of 1934 (48 Stat. 680-763; 26 U. S. Code, Sec. 999) imposed a tax of three cents per pound upon "the first domestic processing" of coconut oil and coconut oil mixtures and specifically defined the term "first domestic processing" as "the first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed."

At the time the statute was passed, petitioner owned 504,875 pounds of refined coconut oil and 117,688 pounds of mixtures containing refined coconut oil which it had purchased from suppliers in the United States for use in the manufacture of its bakery products. All of such oil, including that contained in the mixtures, had been previously processed in the United States in the manufacture of an article intended for sale, that is, the persons from whom the petitioner bought had processed in the United States crude coconut oil to make the refined product which they intended to sell and did sell (R. 7). There was also a small quantity of refined coconut oil and mixtures containing refined coconut oil which petitioner acquired subsequently to the passage of the statute, which oil and mixtures, however, had been processed in the United States prior to the passage of the statute. After the passage of the statute, petitioner

used all of such oil and mixtures in the manufacture of its bakery products (R. 7).

It thus clearly appears and is wholly undisputed that all of the oil in question had been subjected to a domestic processing (*i. e.*, had been used in the United States in the manufacture or production of an article intended for sale) before petitioner bought it and that the petitioner's subsequent use thereof was not the first domestic processing of it.

However, the regulations promulgated by the Commissioner of Internal Revenue depart from the words of the statute and define the term "first domestic processing" to mean "the first use in the United States *on or after the effective date of the Act*" (Italics ours), and, pursuant to such regulations, petitioner was required to pay and did under protest pay taxes aggregating $18,309.76.

On April 10, 1935, petitioner filed its claim for refund of the aforesaid taxes on the ground that petitioner's use of the coconut oil and coconut oil mixtures did not constitute a first domestic processing within the meaning of the statute (R. 8). On October 30, 1935, the Commissioner of Internal Revenue rejected the claim in full (R. 9-10), and on October 28, 1937, petitioner commenced this suit (R. 1).

All of the foregoing facts have been found by the Court of Claims.

Error Assigned.

The Court of Claims erred in holding that petitioner's use of the oil was taxable.

Reasons for Granting the Writ.

1. In reaching its conclusion that petitioner's use of the oil was a taxable transaction, the Court of Claims disregarded this Court's oft-repeated pronouncement that the denial of a writ of certiorari imports no expression upon the merits of a case and allowed itself to be largely gov-

erned and influenced by the denial of certiorari in *Loose-Wiles Biscuit Co.* v. *Rasquin*, 95 F. (2d) 438 (C. C. A. 2d, 1938), 305 U. S. 611, in which the same question presented by this case was involved (R. 13).

2. The decision of the Court of Claims, though in conformity with the *Loose-Wiles Biscuit Co.* decision by the Circuit Court of Appeals for the Second Circuit and with *Colgate-Palmolive-Peet Co.* v. *U. S.*, 37 Fed. Supp. 794, a decision of the District Court of Delaware which came down after the decision in this case, is in conflict with two other District Court decisions, namely, *Cincinnati Soap Co.* v. *U. S.*, 22 Fed. Supp. 141, and *Armour & Co.* v. *Harrison*, 19 A. F. T. R. 1347. In the *Armour* case, the Government took an appeal, but discontinued it and refunded to the taxpayer a large sum of money representing approximately 94 per cent of the refund of tax which the taxpayer was claiming. (See the stipulation for settlement reported in *Armour & Co. of Delaware* v. *Harrison*, 95 F. (2d) 993 (C. C. A. 7th (1937)). The *Colgate-Palmolive-Peet* case has been appealed to the Circuit Court of Appeals for the Third Circuit. The decision in the *Cincinnati Soap* case was on a demurrer filed by the Government, and petitioner understands that the case is now pending for the trial of certain issues of fact which the Government has raised.

3. The Court of Claims in its opinion remarks that, if this issue were before it as a matter of first impression, it would have doubt whether the Congress intended to tax oils in stocks that had previously been processed in the United States (R. 11). It resolves its doubt against the taxpayer because of the language of the regulations and because this Court refused a writ of certiorari in the *Loose-Wiles Biscuit Company* case, *supra*. The regulations were plainly intended to recognize the rule that statutes are to be given only prospective application and yet by a quirk of language

they reach exactly the opposite result. In the *Loose-Wiles Biscuit Company* decision the Circuit Court overlooks and disregards the definition of "first domestic processing" as the "first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed." It would be impossible to conceive of more fallacious reasoning than that which furnishes the only support to the Court of Claims' conclusion.

4. The case involves the construction of a revenue statute affecting numerous taxpayers, and it is to be expected that litigation of this question will continue until this Court finally decides it.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Court of Claims should be granted.

HUGH SATTERLEE,
Counsel for Petitioner,
Munsey Building,
Washington, D. C.

August 4, 1941.